SEP 18 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1953

No. 358

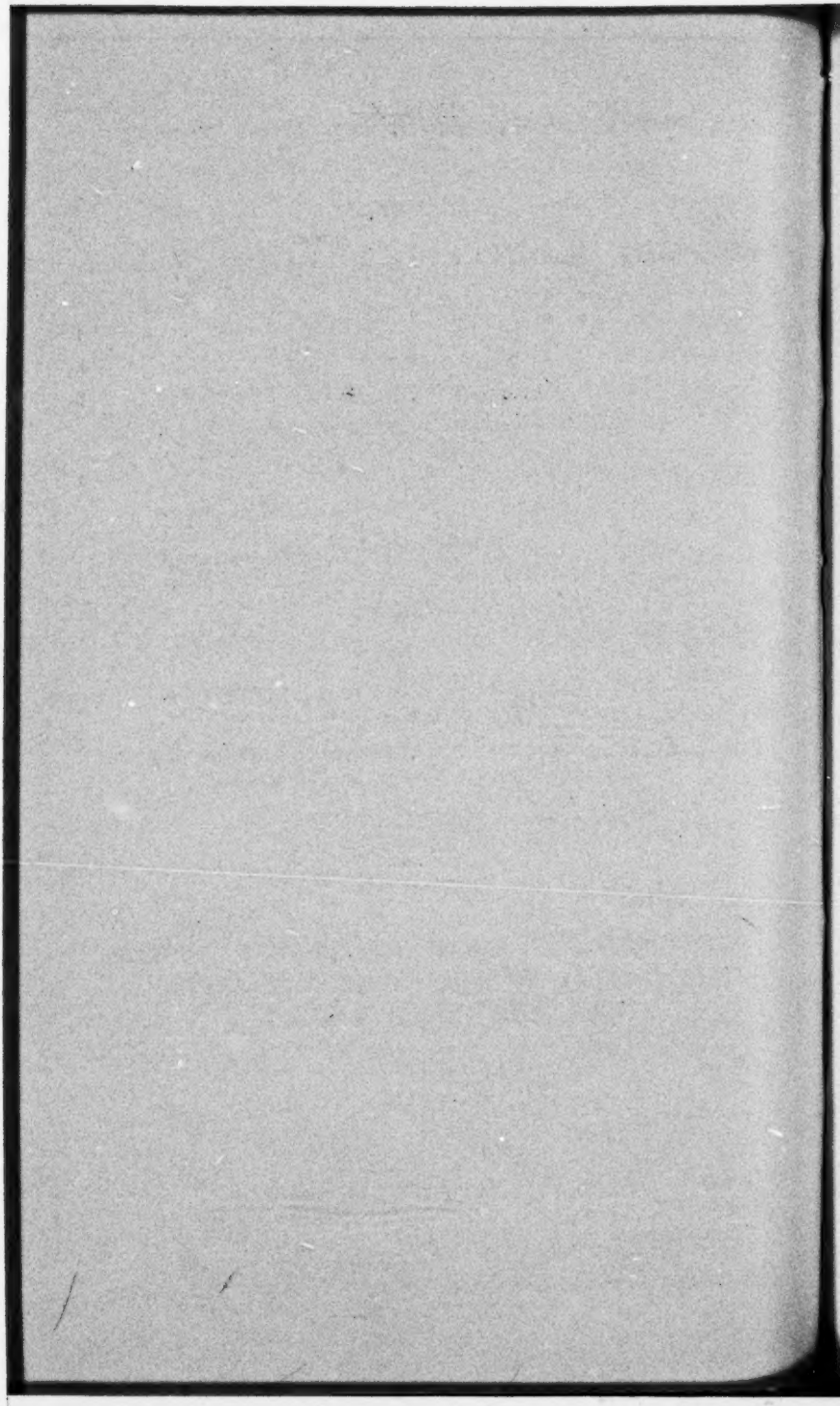
D. E. WHELAN and R. J. WHELAN, *Petitioners*,
v.
JOE A. RILEY, ASSESSOR-COLLECTOR OF TAXES IN AND FOR HARRISON COUNTY, TEXAS, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOHN E. TAYLOR,
MORTON TAYLOR,
P. O. Box 1081,
Sinton, Texas

JAMES D. SMULLEN,
3000 Gulf Bldg.,
Houston 2, Texas,
Counsel for Petitioners

ALPHA LAW BRIEF CO., HOUSTON



INDEX

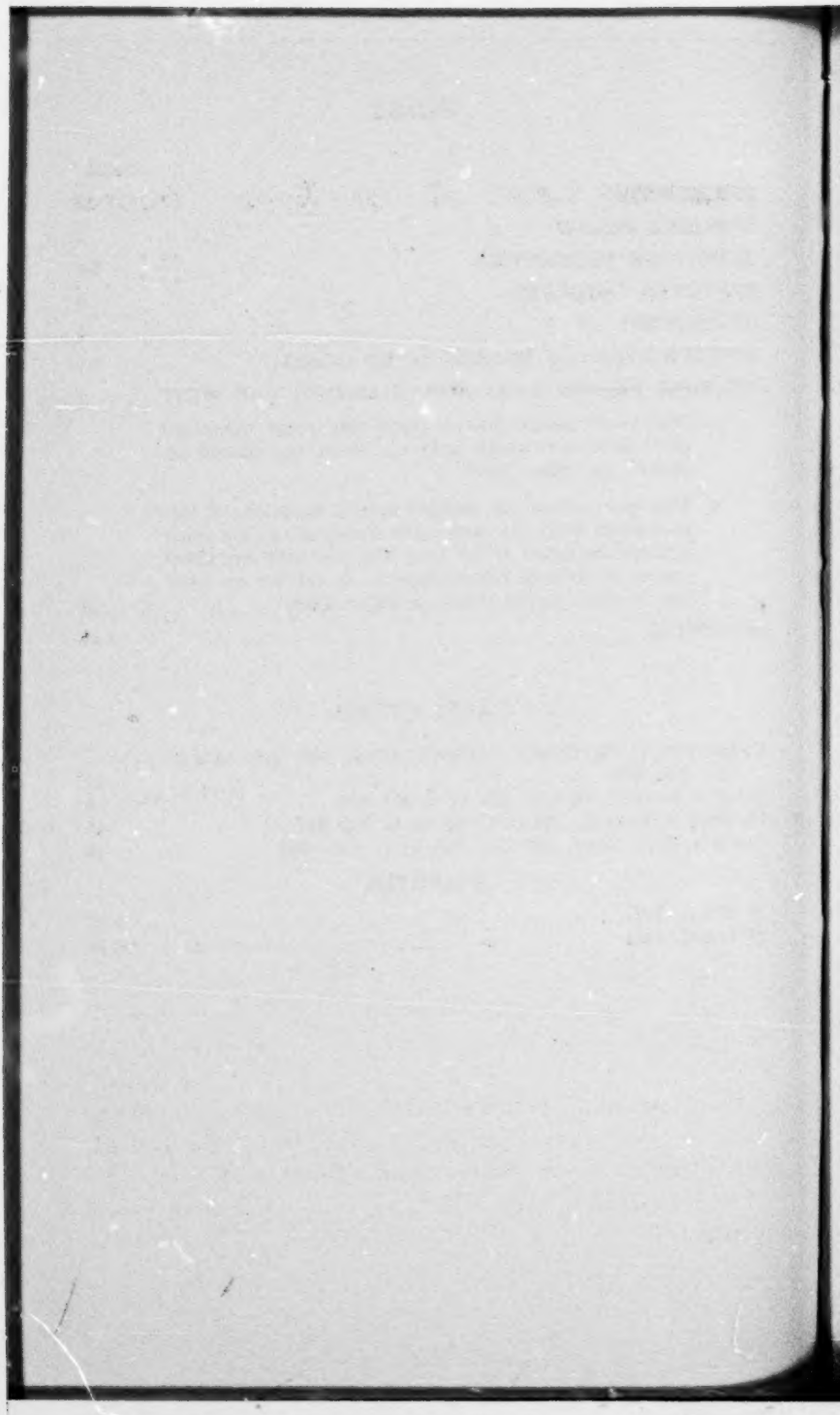
	PAGE
JURISDICTION	2
OPINIONS BELOW	2
QUESTIONS PRESENTED	2-4
STATUTES INVOLVED	4
STATEMENT	4
SPECIFICATION OF ERRORS TO BE URGED	7-8
REASONS RELIED UPON FOR GRANTING THE WRIT	8
1. The court below has decided important questions of Federal law which have not been, but should be, settled by this Court	8
2. The court below has decided federal questions of law in conflict with the applicable decisions of this court and has departed so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision	13
APPENDIX	17

CASES CITED

Cummings v. Merchants' National Bank, 101 U.S. 153, 25 L. Ed. 903	11
Scott v. Donald, 165 U.S. 107, 41 L. Ed. 648	15
Packard v. Banton, 264 U.S. 140, 68 L. Ed. 597	15
Clark v. Paul Gray, 306 U.S. 583, 83 L. Ed. 1001	15

STATUTES

28 U.S.C. 1331	4, 17
28 U.S.C. 1341	4, 17



IN THE

Supreme Court of the United States

October Term, 1953

No._____

D. E. WHELAN and R. J. WHELAN, *Petitioners*,

v.

JOE A. RILEY, ASSESSOR-COLLECTOR OF TAXES IN AND FOR HARRISON COUNTY, TEXAS, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, D. E. Whelan and R. J. Whelan, respectfully pray that a writ of certiorari be issued out of and under the seal of this Court to review the decision of the United States Court of Appeals for the Fifth Circuit, rendered on June 30, 1953, which affirmed a judgment of the United States District Court for the Eastern District of Texas dismissing petitioners' Amended Complaint for lack of jurisdiction.

Jurisdiction

Jurisdiction to review this case upon writ of certiorari is conferred upon this Court by 28 U.S.C. 1245 (1).

The opinion of the Court of Appeals for the Fifth Circuit was filed June 30, 1953. An order was made by that court staying the mandate until September 22, 1953, pending the filing of this petition for certiorari.

Opinions Below

The opinion of the District Court is reported in F. Supp. , and is also printed in the record (R. 44-45).

The opinion of the Court of Appeals appears in F. 2d , and is also printed in the record (R. 54-56).

Questions Presented

A brief procedural history of this suit will assist the Court we believe.

This suit has never been answered on the merits. The allegations of fact contained in the Amended Complaint which demonstrate omission of property from assessment are drawn from the defendant's own official records. But, defendant filed a motion to dismiss which the trial court sustained. The motion was based upon 28 U.S.C. 1341 (the "Johnson Act") and did not constitute a denial that either (a) the requisite jurisdictional amount of $3,000.00 exclusive of interest and costs was involved or (b) a federal question was presented.

The Honorable Court of Appeals for the Fifth Circuit refrained from any mention of the Johnson Act, and its opinion affirmed the dismissal of the suit holding:

1. Petitioners made no showing that the requisite juris-

dictional amount of $3,000.00 is involved between Petitioners and the respondent, Riley; and

2. No federal question is "integrated in the record" which would determine the case in favor of one side or the other.

The questions presented by this petition and record are:

1. Does 28 U.S.C. 1341 deny to a Federal district court jurisdiction of a case wherein a citizen and taxpayer seeks to enjoin a public officer from discriminating in favor of other taxpayers and potential taxpayers where, in a suit for injunction and declaratory judgment, the plaintiff does not seek to enjoin any tax? A judgment in favor of the petioners herein will operate to produce a plan of assessment in substantial conformity with the statutes of Texas which levy the ad valorem tax in question upon all property and not merely the types of property owned by the plaintiff.

2. Do the allegations of plaintiffs in this cause, including the allegation that plaintiffs have suffered an assessment of taxes in excess of $13,000.00 for each of two years (1950 and 1951) and that such taxes are at least 33-1/3% greater than they would have been in event the defendant has assessed all the property omitted from assessment, show that the matter in controversy exceeds $3,000.00 exclusive of interest and cost?

3. Does the Amended Complaint of plaintiffs herein present a federal question in view of their allegations that the defendant, a state officer, has intentionally persisted in omitting from assessment specific classes

of property which have a value compared to the value of the property actually assessed as follows:

Year	*Amount of Property Assessed*	*Amount of Property Omitted from Assessment*
1950	$31,473,957.38	$23,317,336.50
1951	$33,867,146.34	$24,996,827.03

the exclusion of which amount of property (a) deny to plaintiffs the equal protection of the laws and (b) deprives plaintiffs of their property without due process of law?

Statutes Involved

28 U.S.C. 1331

"The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States."

28 U.S.C. 1341

"The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

Statement

D. E. Whelan and R. J. Whelan, petitioners herein, brought this suit for injunction and declaratory judgment in an effort to compel the defendant, Joe A. Riley, to comply with the statutes of the State of Texas in his assessment of ad valorem taxes in Harrison County, Texas. Petitioners are, and have been for many years, residents and taxpayers in said County, while the defendant has, as an elected official, been the Assessor-Collector of Taxes in said County

continuously since 1934. Petitioners discovered valuable natural gas producing properties in said County in 1944 and these leases are subject to ad valorem taxation, as is all other property (with a few specific exceptions). Defendant Riley is charged with the duty of assessing all taxable property, and his intentional failure to assess all types of property is alleged in detail in petitioners' Amended Complaint (R. 2-41). The essence of petitioners' suit is that, as owners of property which is assessed, their share of the lawful tax burden is far greater than it lawfully should be for the reason that the defendant Riley intentionally fails to assess large amounts of property which are subject to assessment and taxation under the Statutes of Texas. The tax burden is not equal in any sense, but is imposed solely on the basis of the *character* of the property which the defendant elects to list for purposes of assessment. The system adopted by defendant is to assess *some* types of property. Specifically, land and improvements are assessed; but money, bank deposits, stocks, and bonds are completely omitted from assessment. Petitioners chief property "happens" to be leasehold estates productive of gas. If liquidated by sale, and the proceeds deposited in a local bank, defendant's long established practice would exclude such proceeds from assessment. Whether property is taxed or not depends solely upon the discretion of the defendant.

The discrimination is evident under the "Riley Plan". It penalizes the gas producer and the non-banking homeowner. It is this *system* which petitioners seek to correct, but to correct only in such manner so assessment will be performed in accordance with the statutes of the State of Texas. Petitioners suffered this discrimination in assessment for several years prior to the institution of this suit. In an effort to induce the respondent to assess all property, they have furnished him specific data as to the identity and location

of property having a taxable situs in Harrison county. (Collection and submission of data consumed the months of February through May, 1953). Respondents adamantly ignored the information furnished and made no effort to assess the classes of property which he had always excluded from assessment.

Failing to secure cooperation from respondent, or even a reply to their requests that all taxable property be assessed, petitioners filed this suit for injunction and declaratory relief. Their efforts in behalf of lawful assessment revealed that monies, stocks, bonds and cattle having a value in excess of 2/3 of the value of the real property which was assessed, was not assessed by respondent. Thus for every $1.00 assessed value, respondent chose not to list 66c worth of other taxable property.

Petitioners' property is, and was, chiefly of the character which had long been assessed. Owning some money (which they rendered) petitioners did not own any bonds, stocks or cattle subject to taxation in Harrison County.

In 1950, 1951 and 1952, the assessed values placed upon petitioners' properties by respondent's tax rolls resulted in taxes in excess of $13,000.00 each year. But total tax assessment was based upon a county wide valuation of $31,473,957.38 and $33,867,146.34 in 1950 and 1951 respectively. Entirely omitted were properties in excess of $23,000,000.00 for each of these years.

Thus petitioners' property bore the tax burden which under Texas statutes is cast upon "all property." If all property, or at least that to which respondent was directed, has been assessed by respondent, the tax assessment of petitioners on the same property assessed would have been less than $10,000.00. For each year involved, petitioners have, as the several obligation of each of them, suffered an assessment more than $3,000.00 greater than would have resulted

if respondent had performed his duty of listing the omitted properties to which he was directed by petitioners. Parenthetically, petitioners' money was assessed, but they were the only taxpayers so assessed although there are two national banks in the City of Marshall alone.

Petitioners' suit was dismissed without joinder of the issue of the amount in controversy and they were denied any opportunity to prove their actual pecuniary damage due to the overassessments. The trial court evidently viewed the matter of jurisdiction to be amply supported by the Amended Complaint. An arithmetic calculation *proves* the allegations of petitioners regarding the "matter in controversy."

From the order dismissing this suit, petitioners appealed to the Court of Appeals for the Fifth Circuit and there briefed and argued the cause on the sole ground that 28 U.S.C. did not deny jurisdiction to the District Court. The Court of Appeals rendered the opinion found in the record (R. 54-56) which is bottomed on the holding that petitioners failed to show (a) the requisite amount in controversy and (b) any federal question integrated in the record.

Petitioners now bring to this Court their petition for writ of certiorari to determine whether their Amended Complaint shows on its face that the district had jurisdiction of this cause.

Specification of Errors to be Urged

Petitioners respectfully submit that the Court of Appeals erred in the following matters:

1. In affirming the order of the District Court dismissing this suit (R. 57).
2. In holding that petitioners failed to plead and show that the matter in controversy between petitioners

and respondent equals the sum or value of $3,000.00 exclusive of interest and costs (R. 55).

3. In holding that petitioners failed to plead and show that a federal question exists on which the decision of the case would turn for one side or the other (R. 55-56).

Reasons Relied Upon For Granting The Writ

1. The court below has decided important questions of Federal law which have not been, but should be, settled by this Court.

Argument

The holding of this Court in UNITED STATES v. LEE, 106 U.S. 196, 27 L. Ed. 171, that:

> "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of that law and must obey it."

states clearly the *principle* invoked by petitioners in this suit against respondent, an elected, and long-entrenched state officer.

Just as clearly does a second holding in the same case, as follows:

> "Courts of justice are established, not only to decide upon the controverted rights of the citizens as against each other, but also upon the rights between them and the government."

state the *purpose* of this suit.

Respondent, the Assessor of Taxes for Harrison County, Texas, is vested with the sole authority to prepare the tax assessment lists. Essentially, the lists are *lists of property* and to each item of property is then "attached" the owner thereof. (Some property is assessed where no owner is described; but no owner is assessed ad valorem taxes unless there is property assessed.) Basically the tax is levied upon "all *property*" by the statute of Texas. But, no property is assessed unless it is listed by the respondent. It is his lists, and his alone, which constitute the assessment lists.

The taxpayers rendition cannot constitute an assessment list unless adopted by respondent. The Board of Equalization which approves the lists prepared or adopted by respondent cannot add or remove property to or from such lists for its function is confined to the consideration of the value of property which is listed. Thus, if respondent does not list an item of property, there can be no lawful assessment thereof. The owner of property which respondent fails to list is not liable for any tax thereon. Petitioners' complaints allege, in detail, specific classes of property which are not listed for assessment by respondent (R. 2-41). These classes escape taxation thereby although the Texas ad valorem tax is levied thereon. If, by accident or design, a person owns property of these classes only, be it worth millions of dollars, the tax levied by statute is not collectible for want of assessment. Conversely, those situated as are petitioners who own property which is assessed by respondent must bear the tax burden which the statutes contemplate would be borne by all property.

Respondent cannot deny the existence of the classes of property, or the property itself, which he refuses to list. Petitioners have gathered detailed data thereon and tendered it by registered mail to respondent. Their efforts failed to secure compliance with the statutes of Texas.

The District Court dismissed this cause after motion made by defendant based upon the terms of 28 U.S.C. 1341. The Court of Appeals impliedly differed from the District Court for the reason that it adopted petitioners' argument that no tax, assessment, levy or collection is sought to be restrained. But the Court below then proceeded to utilize petitioners' contention to hold that they cannot seek to restrain an unlawful *system* of assessment and involve thereby a matter in controversy having a value of $3,000.00 exclusive of interests and costs. This holding is apparently based upon the reasoning that unless a taxpayer seeks to restrain a tax, an assessment, a levy or a collection, then the matter in controversy is not shown in the requisite amount.

Petitioners will admit that a suit to enjoin a tax stated to be a specific amount for a given year would simplify the demonstration of the value of the matter in controversy. Such a suit could fall under the ban of 28 U.S.C. 1341. Petitioners contend, however, that they have shown an *injury measurable in money*, which for the years 1950 and 1951 exceeds $3,000, and which injury resulted solely from the operation of the system which they seek to enjoin from further and future operation. Discrimination in ad valorem taxation is not limited to differences in the assessed values of similar properties. Far more punitive is the complete exclusion of one class of property and the assessment of another class. Unquestionably discriminatory taxation, however demonstrated to a Federal Court of equity powers, invokes the jurisdiction of such court.

Petitioners alleged that the system of respondent insofar as only five classes of omitted property are concerned, operated to cause their property to bear $4,444.44 more taxes in each of the years 1950 and 1951. This is demonstrated by viewing the Amended Complaint as a whole and by the allegations of Part 17 f(1) thereof (R. 35).

Specifically, the court below has held that a *system* of assessment cannot injure a taxpayer to the extent that such system can be enjoined. Its reasoning must be that if petitioners' property was subject to assessment (as it admittedly was) and the assessment of their property was not inherently unlawful, then there can be no injury and, therefore, no value of the matter in controversy. Such reasoning would likewise deny relief to a citizen whose property has been valued at actual market value, while property of other taxpayers is assessed at only 10% of market value. Obviously, such a discrimination is unlawful. CUMMINGS v. MERCHANTS' NATIONAL BANK, 101 U.S. 153, 25 L. Ed. 903. Yet, viewed in a vacuum, the 100% valuation assessment is not unlawful. It is the comparison only which reveals the vice.

In the case at bar a similar comparative method has been employed in petitioners' Amended Complaint. And, thereby, the illegal plan or system of the defendant Riley is revealed. If it be established that discrimination may result as surely from non-assessment of property owned by other taxpayers as from under-assessment of such property, the sole question remaining is whether such non-assessment results in an invasion of petitioners' property rights as is capable of ascertainment in terms of money, or "value", under 28 U.S.C. 1331. Petitioners respectfully submit that their Amended Complaint shows with the required certainty that the continued non-assessment of millions of dollars worth of taxable property results in past injury to them in excess of $3,000 as well as the present probability of future injuries amounting annually (or upon each annual assessment) to more than $3,000. It should be evident that if 24 millions of dollars were added to a tax assessment roll of 33 millions of dollars, and if little or none of the additional values stemmed from petitioners' property, then petitioners

would bear less taxes. Based upon an assessment of $14,000 in taxes ($500,000.00 assessed values) for petitioners, their share of the burden of government would have been substantially less. This then is the value of the matter in between petitioners and respondent.

The court below therefore erred in its holding that a suit to enjoin a *system* of assessment, since it does not complain of, or seek to enjoin, a specific tax, *cannot* involve a matter in controversy which has an ascertainable value in dollars in excess of $3,000 exclusive of interest and costs. The error is made plain by the case of REAGAN v. FARMERS' LOAN & TRUST CO., 154 U.S. 362, where (at page 390) it was held that:

> "A valid law may be wrongfully administered by officers of the state, and so as to make such administration an illegal burden and exaction upon the individual. A tax law, as it leaves the legislative hands, may not be obnoxious to any challenge, and yet the officers charged with the administration of that valid tax law may so act under it in the matter of assessment or collection as to work an illegal trespass upon the property rights of the individual."

And in the case of RAYMOND v. CHICAGO UNION TRACTION CO., 207 U.S. 20, this Court upheld the right of action in a federal court to restrain the collection of taxes that had been assessed at a different rate and by a different method from that employed with respect to other taxpayers of the same class, in defiance of the provisions of a constitutional statute that required equalization, and also in denial of the equal protection of the laws within the meaning of the Fourteenth Amendment.

Petitioners' appeal to this Court is that it will not further the ends of justice if they are denied a federal forum to determine, upon the merits, if the system or plan of the respondent which requires them to bear a disproportionate

tax burden in violation of their rights as citizens of the United States. Such determination will not interfere with the fiscal affairs of the State of Texas or the County of Harrison. It will not impede or prevent the collection of any tax. If petitioners prevail, the sole result possible will be to achieve equality of assessment and to prevent the omission from assessment of large bodies of property which now enjoy an unlawful exemption from taxation. The question of law now presented to this Court is whether a citizen of the United States subject to a state ad valorem tax levied upon "all property" is denied the equal protection of the laws by a state officer who intentionally omits from assessment the property of other taxpayers of the same class in a manner to cause the citizens whose property is assessed to bear a greater tax burden than would result from the assessment of all property upon which the tax is levied by the state legislature. To hold that such a plan of assessment, and non-assessment, by a State officer acting in derogation of the statutory levy, is not violative of the "equal protection" clause of the Fourteenth Amendment, is to render the concept of "equal taxation" meaningless and to relegate to an officer the power to ignore and defeat the mandate of the legislative department.

2. The court below has decided federal questions of law in conflict with the applicable decisions of this court and has departed so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Argument

A. The court below held that the allegation that: "Plaintiffs have been assessed taxes by the defendant in excess of $13,000.00 for each of the years 1950 and 1951; that because of the omission of the classes and amounts of property

listed herein (the Amended Complaint) by the defendant, their taxes have been at least 33-1/3% greater than they would have been had said omitted property been assessed" failed to show that the matter in controversy exceeded the value of $3,000.00, exclusive of interest and costs.

Aside from the allegation quoted above, petitioners' Amended Complaint (R. 2-41) consists almost entirely of a detailed description of the system of assessment employed by respondent in 1950 and 1951, and which system is sought to be restrained. Thus the allegations of the complaint, taken as a whole, allege and demonstrate that petitioners are subjected to discriminatory taxation in that their property is of the class of property which is assessed to produce a county-wide assessment base of 33 million dollars in1951, while 24 million dollars worth of property is omitted from assessment. Even allowing for the fact that the assessed value of $33,867,146.34 represents something less than the market value of the property actually assessed, the inclusion of $24,996,827.03 would have reduced the assessment of petitioners by more than $3,000 in 1951. The same is true for the year 1950 and will be true for each succeeding year. Therefore, the injury suffered by petitioners in each of said years constitutes the invasion of a right of petitioners which exceeds $3,000 in value.

In M. & M. Transp. Co. v. City of New York (C.C.A. 2d), 186 F. 2d 157, Judge L. Hand held:

> " * * * in the case of taxes, * * * it is now settled that it is the value of the taxes, or fees, which the plaintiff will be obliged to pay, if they are valid."

Similarly, the commuted value of future taxes are includible for this purpose if there is "a present probability of such harm." Food Fair Stores v. Food Fair (C.C.A. 1st), 177 F. 2d 177 at 184.

This Court held in SCOTT v. DONALD, 165 U.S. 107, 41 L. Ed. 648, that in a suit for injunction the value of the matter in controversy is to be determined by the value of the property to be protected from invasion, and that plaintiff need not wait until his property of such value has been actually seized.

In PACKARD v. BANTON, 264 U.S. 140, 68 L. Ed. 597, the plaintiff alleged that he was the owner of four taxicabs and that a tax threatened to be imposed would reduce his earnings by $18.50 per week for each vehicle. The court held that this was sufficient to show that the amount in controversy exceeded $3,000.

The above holdings are clearly the law. Under these rules and the facts alleged in petitioners' Amended Complaint, it is plain we submit, that the past injury to petitioners has exceeded $3,000. The future repeated invasions will equal or exceed $3,000 for each succeeding year. For purposes of testing plaintiffs' allegations to sustain jurisdiction it is not required that plaintiffs must prevail on the merits. For example, the recent case of CLARK v. PAUL GRAY, 306 U.S. 583, 83 L. Ed. 1001, decided by this Court, held that an allegation that plaintiff "causes to be caravaned into the said state * * * approximately one hundred fifty (150) automobiles each year" subject to a tax of $15.00 per automobile sustained the requisite jurisdictional amount of $3,000. Certainly the allegations of petitioners' Amended Complaint show with greater certainty that their rights to be protected equal the value of $3,000. It is demonstrable that the injury has already accrued exceeding such amount.

B. The court below held that petitioners had failed to show a federal question integrated in the record which would determine the cause for one party or the other.

Petitioners respectfully submit that the federal question is whether they have been denied, by the plan of the respondent,

the equal protection of the laws of the State of Texas. The court below could not have accurately appraised petitioners' Amended Complaint without perceiving that:

1. Petitioners' property is of a class (real property) which respondent lists for assessment, and petitioners are thereby assessed, annually, on 90% of all of their taxable property.

2. Thousands of other taxpayers (or potential taxpayers) who own property of a different character but which is equally subject to taxation, are either not assessed any taxes, or are only assessed upon 50% or less of their total amount of taxable property.

3. Since all property is subject to assessment, there is no warrant or authority for the omission of such property from assessment, and the omission results solely from the refusal of respondent to perform his duty of listing such property.

4. It is the acts of respondent, a state officer, which deny petitioners the "equal protection of the laws" in plain violation of the Fourteenth Amendment to the Constitution of the United States of America.

We respectfully submit that a determination that the acts of respondent in this matter violate the Fourteenth Amendment will resolve the controversy in favor of petitioners.

Respectfully submitted,

D. E. WHELAN,
R. J. WHELAN,

By_____

JAMES D. SMULLEN,
3000 Gulf Bldg.,
Houston 2, Texas,
Counsel for Petitioners

JOHN E. TAYLOR,
MORTON TAYLOR,
P. O. Box 1081,
Sinton, Texas

APPENDIX

STATUTES INVOLVED

28 U.S.C. 1331

"The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States."

28 U.S.C. 1341

"The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."